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Office of the Secretary,
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

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Comments on Further Notice of Proposed Rule Making: Changes to C Block Auction
Rules for Broadband PCS (4 pages)

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RE: Comments on Further Notice of Proposed Rule Making: Changes to C Block Auction Rules for
Broadband PCS (4 pages)

On 29 June 1994, the Federal Communications Commissions inspired many to believe in fair competition and encouraged participation in the PCS auction as set forth in the Fifth Report and Order concerning 'Designated Entities'. Soon after that Order, Ondas Communications Services, began organizing to recruit capital and compete in the auction.

Then on 28 March 1995, after the MTA auction, a 'Stay' was issued by the Washington D.C. District Court, following a lawsuit by Telephone Electronics Corporation, of Jackson, Mississippi. After a period of uncertainty the 'Stay' was lifted in mid April 1995. A settlement was reached, and the third auction was re-scheduled with all else remaining the same. However, during this period we experienced a decline in confidence on the part of investors. Nonetheless, we resumed and submitted our application which was promptly returned, as a result of the FCC's reaction to the Supreme Court's decision on **Adarand Constructors, Inc. v. Peña**, 63 U.S.L.W. 4523 (U.S. June 12, 1995) (hereinafter "**Adarand**"). Now the Commission is proposing to change the rules for C block. After a second stop and start, the Commission now decides to proceed with the third auction citing a need to avoid litigation. We fear that the question of race and gender may wrangle the FCC with questions of access and fair competition. In the meantime, the MTA PCS license winners are free to deploy their networks and get market ready.

We in turn now face investors smiling with a weary sense of skepticism. We no longer find ourselves on a level playing field. For instance, the FCC's remark, in its Further Notice of Ruling Making (FCC 95-263):

"We want to emphasize that our tentative conclusion to eliminate race- and gender-based measures from the C block auction rules does not indicate that we have concluded that race- or gender-based measures are inappropriate for any of the other spectrum auctions we will hold in the future."

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This is enough to make any minority investor wince and question the real intent of the FCC. Speaking more to the point, we tend to consider the Commission's action eliminating race and gender to be just that, an ironic elimination, if not a sad reduction in race and gender participation in the third auction. In which case, by default, race and gender are relegated to the 10Mhz auction, pending the Commission's hope to find accommodations to support a level playing field.

We believe that the FCC is clearly within its authority to proceed with the measures adopted in the Fifth Report and Order adopted June 29, 1994 (the "Fifth Report") even in the face of *Adarand*. First, there are clear distinctions between the facts in *Adarand* and the facts of the auction for the C block. Whereas *Adarand* involved the granting of a government contract to a minority subcontractor who had been certified as a small disadvantaged business, the auction involves a competitive bidding process that does not "set aside" or require quotas for the number of licensees to be granted to women and minority entrepreneurs. The results of a woman or minority entity winning a bid is simply that the entity qualifies for certain preferred financial terms and credits.

Even assuming, arguendo, that *Adarand* applies to the situation at hand, the record shows that the auction, with the race and gender based provisions contained in the Fifth Report, meets the "strict scrutiny" test adopted by the Supreme Court as the racial classifications adopted in the Fifth Report "serve a compelling government interest" and are "narrowly tailored to further that interest." As stated by the Court, "strict scrutiny **does** take relevant differences into account-indeed, that is the fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in government decision-making." *Adarand* at 4530 (emphasis in original). Congress has already decided that this is a compelling government interest by its statutory mandate to the FCC to ensure that women, minorities and small businesses are given a fair opportunity to participate in the awarding of PCS licensees. See 12 U.S.C. Section 309(j)(4)(D). In addition, the auction itself and its rules pertaining to race and gender benefits, by their own nature, are narrowly tailored to ensure that the program "will not last longer than the discriminatory effect it is designed to eliminate." *Adarand* at 4533. Furthermore, the record is full of "convincing evidence that remedial action is warranted" and showing that socially disadvantaged individuals' ability to compete in the telecommunications industry has been impaired "as compared to others in the same or similar line of business **who are not socially disadvantaged.**" *Adarand* at 4528, 4533 (emphasis in original).

One of the reports the FCC consults and cites is the United States Department of Commerce report titled, Capital Formation And Investment In Minority Business Enterprises In The Telecommunications Industries. In the Executive Summary this report states the following:

"The telecommunications sector, on average, is more capital intensive than other businesses where minority enterprises have a historical presence."

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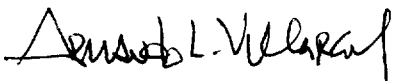
Further, in support, the FCC cites from its own reports pointing to the fact that as of August 1993 only 2.7% of commercial broadcast stations were owned by minorities. From its own account, the FCC points out that only half a percent (.5%) of the telecommunications firms in the country are minority-owned, of which a mere 11 are engaged in the delivery of wireless services. The Commission uses these and other hard facts to formulate policy and order special provisions as prescribed in the Fifth Report.

The commission, in its Further Notice of Proposed Rule Making dated June 23, 1995 (the "Further Notice"), states that "based on the letters we have received from potential bidders, many of whom have made extensive preparations to bid in the C block, we conclude that at this time, minority and women bidders, as well as other bidders, will have a better chance of becoming successful PCS providers if we eliminate the race- and gender- based provisions from the C block and adopt provisions based on economic size only." We strongly disagree with this statement. First, such a statement is in direct contradiction with the FCC studies cited above that show the difficulties women and minority businesses have in raising capital in the telecommunications industry. This difficulty would be accentuated if the FCC, as proposed in the Further Notice, eliminates the race and gender based bidding credit and favorable installment payment terms and replaces them, instead, with lower small business bidding credit and favorable installment payment terms. In addition, we are of the opinion that women and minority entrepreneurs, the entities affected by the Further Notice, would rather stop the auction until the FCC gathers the additional evidence it deems necessary to withstand an *Adarand* challenge.

In the alternative, we encourage the Commission to consider the use of the Small Business Administration size standard of \$5 million. This standard is currently in use by the FCC in the awarding of broadcast licenses to small business. Altogether, we view the lack of a threshold revenue scale for the upcoming auction as shortsighted and counter to the precedence set in the narrow band auction for "Designated Entities." In addition, the \$125 million gross revenue and \$500 million total asset caps should be drastically reduced to ensure a more fair process where true women and minority small businesses are afforded the opportunity to participate and receive the proposed lower small business bidding credit and favorable installment payment terms. Furthermore, stricter measures must be adopted to verify the parent companies and affiliates of participating companies claiming status as small businesses to ensure that the participating company is, in fact, a small business and not a front.

The FCC is now engaged in the largest auction of public assets in American history. In this period of great transition, the FCC has an obligation to expand opportunity by enriching diversity and competition.

Respectfully,



Armando L. Villareal
President

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cc:

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